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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CHRISTIAN ROBERTO UMANZOR, Defendant and Appellant.	G039780 (Super. Ct. No. 06CF3104) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William Lee Evans, Judge. Affirmed.

Jackie Menaster, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Christian Roberto Umanzor (defendant) was charged by information with the unlawful taking of a vehicle, in violation of Penal Code section 10851, subdivision (a) (count one). He was also charged, by amended information, with being an accessory after the fact with respect to the vehicle theft, in violation of Penal Code section 32 (count two).

The jury found defendant not guilty as charged on count one, but guilty as charged on count two—a felony. The court suspended imposition of sentence and placed defendant on three years' probation, on the condition that he serve 60 days in the Orange County jail, pay a restitution fine, pay a probation revocation restitution fine, payment of which was stayed, and pay a security fee.

Defendant appeals. He argues the court abused its discretion in permitting the amendment of the information to add count two, there was insufficient evidence to support the conviction, and the court abused its discretion in declining to reduce the wobbler offense to a misdemeanor. We reject each argument and affirm.

I

FACTS

On the afternoon of August 25, 2006, Ricardo Harris took his 1981 Datsun pickup truck to a gas station in Santa Ana, where he was scheduled to meet a man named Salvador Garcia to discuss a business deal. When he arrived at the gas station, Harris pulled up in front of a pump and parked there. He got out of his truck and went to talk to Garcia. Harris had two sets of keys to the truck, one of which he left in the center console. The men spoke together for at least 10 minutes.

Julio Manzanarez was employed at the gas station. At some point, he noticed that Harris's truck had been parked in front of the pump for about 15 minutes. He saw two men and told them that if they had finished pumping gas, they needed to move the truck.

Harris, still talking to Garcia, saw his truck drive off. He asked Garcia to follow it and got in Garcia's car. The two men engaged in pursuit. A third car, an off-white El Camino, passed Harris and Garcia on the road, and pulled in front of Garcia's car, forcing Garcia to slow down. Harris used his cell phone to call 911, and he provided the police dispatcher with the license numbers of his truck and the El Camino. Ultimately, when they were approximately a quarter to a half a mile away from the gas station, all three vehicles turned onto Baker. The pickup truck pulled over and stopped. The El Camino then followed suit, parking in front of the pickup truck.

Garcia then stopped his car and Harris got out. He "trotted" towards his truck. One man got out of the truck and defendant got out of the El Camino. Harris said to the driver of the truck, "What are you doing? That's my truck." The driver of the truck responded, "The guy in the gas station told me to move it." Defendant said to Harris, "What do you want to do?" Harris told both men that he had called the police. Defendant said to the driver of the truck, "Let's get out of here." Those two men then got in the El Camino and drove away hastily, without handing over the second set of keys to Harris's truck.

Harris got in his truck and began driving away, hoping to follow the El Camino. However, the police arrived, and Harris stopped and spoke to them about the incident.

Officers Rene Bonilla and Todd Henry of the Santa Ana Police Department were the ones who responded to Harris's call. The police ascertained that the El Camino was registered to defendant. Bonilla and Henry went to defendant's address, as reflected on DMV records. The El Camino was parked in the driveway. When defendant approached the officers, he said, "I didn't take the truck. I didn't even touch it."

Defendant told the officers that he had been at the gas station with a friend when a gas station attendant asked them if they owned the pickup truck. Defendant and his friend "remained quiet for about a minute," after which time the gas station attendant

repeated his question. The friend then responded in the affirmative and the attendant told them to move the truck if they were done getting gas. The friend then got in the truck and drove away.

Bonilla asked defendant "why he did not stop his friend from taking the truck." Defendant told Bonilla "that he did not know why he did not try and stop his friend from . . . driving off with the truck." Bonilla asked defendant if he knew who owned the truck and defendant responded that "it was a Black guy that was standing next to another car." Defendant also said "that he followed [his] friend as he was driving off in an attempt to stop him."

Bonilla asked defendant where his friend was and defendant replied that he had dropped him off near certain apartments. When Bonilla asked him to be more specific, defendant responded "that he was not a rat." He claimed not to know his friend's telephone number or where he lived. Defendant identified his friend only by the nickname "Bolas," but gave no first or last name.

A jury found defendant not guilty of the unlawful taking of a vehicle, but guilty of being an accessory after the fact. Defendant appeals.

II

DISCUSSION

A. Amendment of Information:

On December 19, 2006, the original information was filed, charging defendant only with the unlawful taking of a vehicle (Pen. Code, § 10851, subd. (a)). On June 20, 2007, 13 days after answering ready for trial, the district attorney sought permission to file an amended information, adding the charge of accessory after the fact (Pen. Code, § 32) as count two.

Defendant points out that his counsel objected to the amendment of the information. He asserts that he was prejudiced by the amendment inasmuch as he was acquitted of count one and convicted only of count two, as charged in the amendment. In

other words, the prejudice arose because, had the information not been amended, he would not have been convicted of any crime.

As defendant observes, the matter of amendment is addressed in Penal Code section 1009.[1] "Section 1009 authorizes amendment of an information at any stage of the proceedings provided the amendment does not change the offense charged in the original information to one not shown by the evidence taken at the preliminary examination. If the substantial rights of the defendant would be prejudiced by the amendment, a reasonable postponement not longer than the ends of justice require may be granted. The questions of whether the prosecution should be permitted to amend the information and whether continuance in a given case should be granted are matters within the sound discretion of the trial court and its ruling will not be disturbed on appeal absent a clear abuse of discretion." (*People v. Winters* (1990) 221 Cal.App.3d 997, 1005.)

As the Attorney General states, the additional offense charged in the amendment was supported by the evidence adduced at the preliminary examination. Defendant does not contend otherwise. The Attorney General also points out that, about a week before moving for permission to amend, the district attorney had informed

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[1] Penal Code section 1009 provides in pertinent part as follows: "An indictment, accusation or information may be amended by the district attorney . . . without leave of court at any time before the defendant pleads or a demurrer to the original pleading is sustained. The court in which an action is pending may order or permit an amendment of an indictment, accusation or information, . . . for any defect or insufficiency, at any stage of the proceedings . . . . The defendant shall be required to plead to such amendment or amended pleading forthwith, or, at the time fixed for pleading, if the defendant has not yet pleaded and the trial or other proceeding shall continue as if the pleading had been originally filed as amended, unless the substantial rights of the defendant would be prejudiced thereby, in which event a reasonable postponement, not longer than the ends of justice require, may be granted. An indictment or accusation cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination. A complaint cannot be amended to charge an offense not attempted to be charged by the original complaint, except that separate counts may be added which might properly have been joined in the original complaint. . . ."

defendant's counsel of his intention to do so. Furthermore, the district attorney offered to agree to a resetting of the trial date if defendant wanted time to restrategize or to prepare for trial. However, defendant's counsel expressed no interest in a continuance. Finally, the Attorney General draws our attention to the fact that the district attorney moved to amend, and the motion was granted, before voir dire had begun. We see no basis for concluding that the trial court abused its discretion in granting the request to amend. (*People v. Winters, supra,* 221 Cal.App.3d at p. 1005.)

B. Sufficiency of Evidence:

Penal Code section 32 provides: "Every person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony." "A conviction under section 32 requires proof that a principal committed a specified felony, the defendant knew that the principal had committed a felony, the defendant did something to help the principal get away with the crime, and that as a result of this action the defendant intended to help the principal get away with the crime. [Citations.]" (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 536.)

Defendant claims there is no evidence to show that he knew Bolas did not own the truck, that he knew, when he and Bolas drove away together after the confrontation with Harris, that Bolas had committed an unlawful taking of the truck, or that defendant gave any false information to the police. We disagree. The record does indeed contain evidence to show that defendant knew, at least by the time he and Bolas drove off together in apparent avoidance of the police, that Bolas did not own the truck and had taken it unlawfully.

Defendant told Bonilla that when the gas station attendant asked him and Bolas if they owned the truck, they both remained quiet for about a minute. If they did not own the truck, it should not have taken them that long to say so. When pressed as to ownership, Bolas claimed ownership, got in the truck and drove it away. Defendant told Bonilla he did not know why he did not try to stop Bolas from taking the truck. From this one may infer that defendant knew, at the time Bolas took the truck, that it did not belong to him and that it was wrong for him to take it.

In addition, defendant told Bonilla that the owner of the truck was a Black man who had been standing by another car at the gas station. Although defendant claims the record is not clear as to when he became aware of the true owner of the truck, one can easily infer that he learned of it no later than the time Harris confronted Bolas and told him and defendant that he had called the police. One may also infer that when defendant then said, "Let's get out of here," he was concerned about getting Bolas, who defendant knew had just committed a theft, away from the scene before the police arrived and could arrest him. There is sufficient evidence to support the verdict, inasmuch as "'on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]'" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

C. Sentencing:

Penal Code section 33 provides: "Except in cases where a different punishment is prescribed, an accessory is punishable by a fine not exceeding five thousand dollars ($5,000), or by imprisonment in the state prison, or in a county jail not exceeding one year, or by both such fine and imprisonment." Penal Code "section 17, subdivision (b) (hereafter section 17(b)), authorizes the reduction of 'wobbler' offenses—crimes that, in the trial court's discretion, may be sentenced alternately as felonies or misdemeanors—upon imposition of a punishment other than state prison (§ 17(b)(1)) or by declaration as a misdemeanor after a grant of probation (§ 17(b)(3))." (*People v.*

Superior Court (*Alvarez*) (1997) 14 Cal.4th 968, 974, fn. omitted (*Alvarez*).)

"[S]ection 17(b), read in conjunction with the relevant charging statute, rests the decision whether to reduce a wobbler solely 'in the discretion of the court.'" (*Alvarez, supra,* 14 Cal.4th at p. 977.) "'This discretion . . . is neither arbitrary nor capricious, but is an impartial discretion, guided and controlled by fixed legal principles, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice. [Citations.]' [Citation.]" (*Ibid.*)

Defendant claims the trial court here abused its discretion in failing to reduce the wobbler to a misdemeanor. The burden is on him "'to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' [Citation.]" (*Alvarez, supra,* 14 Cal.4th at pp. 977-978.) Defendant has failed to meet his burden, as we shall show.

At the time of sentencing in this matter, the court had before it a probation and sentencing report containing the following information. On November 2, 2004, defendant was sentenced to three years' probation and the payment of a $390 fine for violation of Vehicle Code section 23152, subdivision (a) (driving under the influence). (*People v. Umanzor* (Super. Ct. Orange County, 2004, No. 04CM07990).) DMV records reflected eight additional Vehicle Code violations from May 12, 2005 to June 21, 2006, resulting in four fines and four bail forfeitures.

The incident involving Harris's truck took place on August 25, 2006. DMV records reflected another Vehicle Code violation on January 5, 2007, resulting in another bail forfeiture. On April 9, 2007, defendant was sentenced to three years' probation and the payment of a $300 fine for violation of Vehicle Code section 14601 (driving on a suspended license). (*People v. Umanzor* (Super. Ct. Orange County, 2007, No. 07CM02364).) On May 29, 2007, defendant was again arrested for driving on a

suspended license (Veh. Code, § 14601) and sentenced to 60 days in custody. (*People v. Umanzor* (Super. Ct. Orange County, 2007, No. 07CM06561).) On June 23, 2007, defendant was arrested for violation of Health and Safety Code section 11550, subdivision (a) (use of controlled substance). (*People v. Umanzor* (Super. Ct. Orange County, No. 07NM10265).) The matter remained pending when the probation/sentencing report was written.

The jury rendered its verdict in the matter before us on June 27, 2007, but defendant remained free of custody pending sentencing. Within two days thereafter he was arrested for making criminal threats and committing a felony while out on bail.[2] (*People v. Umanzor*, (Super. Ct. Orange County, No. 07CF2209).) The matter remained pending when the probation/sentencing report was written.

In exercising its discretion on the wobbler issue, a number of factors come into play, including "'the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the trial[,]' [citations]" and general sentencing objectives such as "[¶] (a) Protecting society[;] [¶] (b) Punishing the defendant[;] [¶] (c) Encouraging the defendant to lead a law abiding life in the future and deterring him from future offenses[;] [¶] (d) Deterring others from criminal conduct by demonstrating its consequences[;] [¶] (e) Preventing the defendant from committing new crimes by isolating him for the period of incarceration[;] [¶] (f) Securing restitution for the victims of crime[; and] [¶] (g) Achieving uniformity in sentencing." (*Alvarez, supra,* 14 Cal.4th at p. 978 and fn. 5.)

Here, the probation report showed that defendant repeatedly violated the law. He says now that his violations were all minor and did not justify the sentence the court imposed. However, the point of the matter is that defendant has repeatedly violated

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[2] The probation/sentencing report contains conflicting information as to whether defendant was arrested on June 27, 2007 or on June 29, 2007.

the law, and appears to view his violations as so minor as to be unimportant. However, the laws of this state are not unimportant. Perhaps serving a sentence for a felony conviction will cause him to reflect upon whether it is better to comply with the state's laws in the future rather than to continue violating them. The court's decision here supported the objectives of punishing defendant, deterring him from committing future offenses, and perhaps even deterring others from engaging in criminal activity by demonstrating the potential consequences of such activity. The court's exercise of discretion was "'grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue.' [Citation.]" (*Alvarez*, *supra*, 14 Cal.4th at p. 977.)

III

DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.